SUPREME COURT, U. S.

Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1974

SANFORD S. PARIS, DBA GENERAL SECURITY SERVICES, INC., *Petitioner*	
v.	NO. 73-1691
GERALD E. WEDREN, DIRECTOR, DEPARTMENT OF COMMERCE, et al., *Respondents*	

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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I. THE GRANTING OF A WRIT OF CERTIORARI WOULD BE IMPROVIDENT WHERE NO STATE COURT BELOW HAS BEEN PRESENTED WITH OR CONSIDERED OBJECTIONS BASED UPON ALLEGED VIOLATIONS OF FEDERAL RIGHTS SECURED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

While it is established beyond cavil that certiorari is the only mode of review when a judgment rendered by a state court sustains the validity of the state's authority against attacks based on federal rights (*Ireland v. Woods*,

246 U.S. 323 (1918)); it is equally well established, and resting upon the soundest principles of policy, that the federal question upon which a Petition for Writ of Certiorari is grounded must have been raised in the lower courts (*Loeb v. Columbia Township*, 179 U.S. 472 (1900)). Petitioner devotes numerous pages of his Petition for Writ of Certiorari to an attempt to establish the existence, in this action, of the necessary prior assertion of a denial of a federal right in the administrative proceedings now under scrutiny. A review of the pleadings and decisions of the lower courts can only result in the conclusion that Petitioner failed to properly raise the federal questions he now asserts.

Admittedly, no particular form of words is required to press a federal right in state courts. However, the federal rights in question must have been brought to the attention of and have been considered by the lower courts. *See generally, Lawler v. Walker*, 14 How. 149 (1852); *Herndon v. Georgia*, 295 U.S. 441 (1934); *Street v. New York*, 394 U.S. 576 (1969). Petitioner, at page 29 of his Petition for Writ of Certiorari, argues that because one of his grounds for appeal was that the decision was contrary to law, and that "the 'law' includes the federal constitution", it follows that the federal questions sought to be reviewed were properly raised. It is respectfully submitted that this assertion is incorrect. In the case of *Herndon v. Georgia, supra*, the United States Supreme Court held that an assertion, in the trial court, that the indictment was in violation "of the Constitution of the United States" did *not* constitute a sufficient invocation of a federal question. In addition, an assertion that one was "bound by law" was specifically held not to be tantamount to the assertion of a federal rights question in the case of *Louisville & N.R. Co. v. Smith, Huggins & Co.*, 204 U.S. 551 (1906). Petitioner's ground for appeal — that the decision was "contrary to law" — fails for the same

indefiniteness that caused the petitioner in the *Louisville & N.R. Co.* case, *supra,* to fail.

In the instant action the Petitioner did not raise or assert the denial of a federal right until after the administrative agency involved, the Court of Common Pleas of Franklin County, the Franklin County Court of Appeals, and the Ohio Supreme Court had all passed upon and decided his appeal. At no stage in the appellate procedure was an Ohio Court faced with a due process argument. As a matter of fact, such was not raised until the Petitioner filed, on April 5, 1974 (*subsequent* to the Ohio Supreme Court's denial of Motion to Order the Court of Appeals to Certify the Record), a Supplemental Statement in Support of Motion for Relief from Judgment and for a New Trial in the Court of Common Pleas of Franklin County. Raising the constitutional issues at this point in time is not sufficient, for, in the words of Mr. Justice Sutherland,

> "The long-established general rule is that an attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it." *Herndon v. Georgia,* supra at 443.

At no time in the state courts were the federal questions now before this Court ever considered, for the simple reason that at no time was a federal question raised, briefed, argued, or in any manner presented to any of the courts considering this action on appeal.

Petitioner cites numerous Ohio authorities establishing the principle in Ohio jurisprudence that an Ohio court may consider errors not assigned. That may very well be a correct statement of the law in Ohio. However, in the context of the present action before this honorable Court one must look beyond the rules of the Ohio courts. Specifically, it must be noted that the inescapable fact remains that *no* lower court *ever* considered this action in relation to the

due process provisions of the Fourteenth Amendment to the United States Constitution. What the Ohio courts *may do* does not establish what the Ohio courts *did*.

U.S. Sup. Ct. Rule 19.1(a), 28 U.S.C., represents a codification of the long standing, well entrenched doctrine that a state court must have considered and decided a federal question before review on certiorari may be obtained. Thus, a case must have constitutional dimensions before the filing of a Petition for a Writ of Certiorari; the present case was not, in the course of appeal, adorned with these dimensions until the present Writ was filed. *Ergo*, the lack of timely and providently raised issues of constitutional dimension results in jurisdictional defects to the extent that Petitioner is not properly before this honorable Court and should not be granted the Writ of Certiorari which he seeks.

II. A WRIT OF CERTIORARI WILL NOT ISSUE TO REVIEW EVIDENCE, DISCUSS SPECIFIC FACTS, NOR TO REVIEW INFERENCES DRAWN FROM FACTS IN AN ADMINISTRATIVE PROCEEDING.

There exists a long line of authority establishing the now well-settled proposition that the Supreme Court of the United States will not grant certiorari to review evidence and discuss specific facts. *See generally, United States v. Johnston*, 268 U.S. 220 (1925); *National Labor Rel. Board v. Waterman S.S. Corp.*, 309 U.S. 206 (1940); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175 (1938). In spite of this well-settled doctrine, the Petitioner now requests this Court to grant certiorari based upon what Petitioner alleges the facts, as established in the record, show or fail to show. Many pages of his petition are filled with quotations from the record followed by a lengthy dissertation over what the evidence does or does not establish. In essence, the Petitioner seeks to entice this

Court to substitute its judgment in place of the judgment of the Ohio administrative agency involved as to what the facts establish. Framed as a due process argument is the desire of Petitioner that this Court deny the Ohio administrative agency the opportunity to utilize its expertise in the regulation of private investigators. It is respectfully submitted that such is not the function of certiorari, nor is it the function of a court when reviewing a determination of an administrative agency.

A review of only that portion of the record of the administrative hearing quoted at pages 32 to 35, inclusive, of the Petition for Writ of Certiorari indicates the existence of reliable, probative and substantial evidence from which the hearing officer could, at the least, draw a permissible inference, as he did, that Petitioner violated the statutes requiring registration of employees. Where fairly arrived at, an inference having reasonable support in the record of an administrative proceeding must be accepted by a court. *Houston v. St. Louis Independent Packing Co.*, 249 U.S. 479 (1919); *Federal Trade Commission v. Algoma L. Co.*, 291 U.S. 67 (1934); *National Labor Rel. Bd. v. Bradford Dyeing Asso.*, 310 U.S. 318 (1940). The same rule prevails in Ohio. *See generally*, 1 O. Jur.2d 569, Administrative Law and Procedure § 181.

For the purpose of demonstrating reasonable support for the inferences drawn in the instant action one may consider the following:

1. Licensure of Petitioner to conduct the business was obtained in January, 1971. (See, Petition for Writ of Certiorari, pg. 32, hereinafter "Petition");
2. In July, 1971, Petitioner sent a list of employees to the Division of Licensing, Department of Commerce. (Petition, pg. 33);
3. Only two of the employees named on the above-mentioned list were registered. (Petition, pg. 34).

For purposes of clarity, it should be noted that the above-mentioned list of employees mailed to Respondent was not a registration, or attempted registration, of those listed employees. Section 4749.06, Ohio Revised Code, details the requirements which must be met to properly register employees and the letters would not be sufficient to satisfy those statutory requirements; nor has it ever been asserted that such was Petitioner's intent in sending the letters. There is no denial of due process where one infers from these established facts that the remaining employees on the list were not registered. Similar results can be obtained by reading the entire record for all "controverted" issues of fact.

Furthermore, Petitioner vigorously argues that the record fails to show that he "knowingly" failed to register his employees. In analyzing Petitioner's arguments, it would appear that he considers this to be a concrete entity which one can see and touch. Of course, *scienter* is not such an entity. It is something which can only be inferred from the facts presented. The hearing officer did exactly this in determining that the Petitioner herein knowingly failed to register certain of his employees and all of the Ohio Courts have determined that such inference is supported by reliable, probative and substantial evidence.

III. PROCEDURAL DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS TO THE NOTICE SENT PETITIONER WERE SATISFIED.

In order for any particular notice to comply with the due process requirements of the Fourteenth Amendment to the United States Constitution, the notice employed must be a "... timely and adequate notice detailing the reasons

for a proposed termination . . .". *Goldberg v. Kelly*, 397 U.S. 254, 267, 268 (1970). In the instant action there exists no dispute as to the timeliness of the notice; the dispute centers upon the adequacy of the notice. Petitioner contends that lack of reference to Section 4749.10(B)(1), Ohio Revised Code, in the notice which he received constitutes a denial of due process.

The notices sent to Petitioner stated that under the authority of Section 4749.04, Ohio Revised Code, the Division of Licensing, Department of Commerce, proposed to revoke Petitioner's license for failure to comply with Section 4749.06(A), Ohio Revised Code. (See Petition, Appendix, pages 93-96, inclusive).

Section 4749.04, Ohio Revised Code, provides, insofar as pertinent:

> "The grounds for which the director of commerce may revoke, suspend, or refuse to renew the license of any private investigator or the registration of any employee includes any of the following: (A) Violation of any of the provisions of division (B) of section 4749.10 of the Revised Code . . ." Volume 47, Page's Ohio Revised Code Annotated, 1972 Supplement, page 140.

Section 4749.06(A), Ohio Revised Code, provides:

> "Each private investigator *shall register his employees*, exclusive of clerical help, *with the department*, which shall compile and keep current a list of all licensees and registered employees and make it available, upon request, to any law enforcement agency." (Emphasis added.) Volume 47, Page's Ohio Revised Code Annotated, 1972 Supplement, page 141.

Section 4749.10(B), Ohio Revised Code, provides:

> "(B) No private investigator or registered employee shall: (1) Knowingly violate any provision of Chapter 4749. of the Revised Code." Volume 47, Page's Ohio Revised Code Annotated, 1972 Supplement, page 142.

Quite clearly, Section 4749.10(B)(1), Ohio Revised Code, is a "basket clause" provision, the sole purpose for which is to insure compliance with the various statutory mandates established throughout the remainder of Chapter 4749., Ohio Revised Code. A reading of Section 4749.10 (B)(1), Ohio Revised Code, indicates that problems of constitutional dimension would quite possibly be present had respondents only made reference to Sections 4749.04 (A), and 4749.10(B)(1), Ohio Revised Code. Had that been the situation, the notice would have been a futile gesture so replete with vagueness that there would have been little opportunity to prepare for the hearing or know what specific statutory requirement Petitioner had allegedly violated or failed to comply with. But that is not what occurred. Specific and direct reference was made to that section which would most adequately inform the Petitioner of what the proceedings were to be concerned with in order to assure that Petitioner would be able to present his defense at the hearing. The specific act or omission that Petitioner was charged with and notified of was his failure to register employees as required by Section 4749.06(A), Ohio Revised Code. Reference to Section 4749.10(B)(1), Ohio Revised Code, would not have aided Petitioner's preparation for the hearing in the slightest as it has nothing to do with the act or omission for which his license was revoked. Rather, it was merely relied upon as a statutory vehicle for enforcing the registration requirements of Section 4749.06(A), Ohio Revised Code. It is respectfully submitted that the notice given must be suitable for a given case and it is only where the proceedings are arbitrary, oppressive, or unjust that notice will be said not to comport with due process requirements. See *Glidden v. Harrington*, 189 U.S. 255 (1903). In reference to the instant petition, the notice sent was suitable and the proceedings were fairly conducted.There was no denial of due process.

CONCLUSION

Respondents respectfully submit that a Writ of Certiorari should not issue in the instant proceeding. Petitioner failed to afford to the lower courts considering this action on appeal the opportunity to pass upon or consider the issue of denial of federal rights. Since the beginnings of the American system of jurisprudence such a failure precludes the issuance of a Writ of Certiorari by this Court. Further, certiorari would not be proper to review the evidence in the record in relation to the inferences drawn therefrom or the facts established thereby. Though without regard to the federal rights questions which were never raised, the Ohio judiciary has considered the inferences drawn from the facts as presented and found them to have been fairly established in the record. A reading of the defenses presented by the Petitioner at the administrative hearing amply demonstrates that the notice sent Petitioner comported fully with the due process requirements of the Fourteenth Amendment to the United States Constitution. Clearly, via the notice employed, Petitioner was fully informed of the violations resulting in revocation of his license.

Furthermore, issues of constitutional dimension which are of great public and national concern and which are worthy of this honorable Court's consideration are of such calibre inherently. The issues presented herein are well settled and Petitioner cannot, as he has tried, make the situation otherwise by merely alleging, as he has, that the issues presented herein are of great public importance because state regulatory agencies have great powers and that their dictates are rubber-stamped by their state courts. Respondents submit that this is not the state of affairs in Ohio.

Based upon the foregoing, Respondents respectfully submit that this Court should refuse to grant Writ of Certiorari in the instant action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify, in accordance with U. S. Sup. Ct. Rule 33, 28 U.S.C., that three copies of the foregoing have been mailed, postage prepaid, to the office of Andrew M. Fishman, Esq., Attorney for Petitioner, Thompson, Swope, Burns & Biswas, 6810 East Main Street, Reynoldsburg, Ohio 43068, this ..... day of ....., 1974.

MICHAEL R. GROVE
Assistant Attorney General